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Supreme Court, U.S.
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OFFICE OF

No.

IN THE

Supreme Court of the United States

MACDONALD LETTER SERVICE , INC.,
Petitioner

v.

MICHAEL MARSHALL, SECRETARY OF THE IOWA SENATE AND MARGARET THOMSON, CHIEF CLERK OF THE IOWA HOUSE OF REPRESENTATIVES,
Respondents

On Petition For Writ Of Certiorari
To The Supreme Court of Iowa

APPENDIX

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I U.S. Constitution, amendment 1.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

II. U.S. Constitution, amendment 14.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

1. Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, **and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.**

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the

enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

III. Iowa Constitution, Article 1 § 20.

The people have the right freely to assemble together to counsel for the common good; to make known their opinions to their representatives and to petition for a redress of grievances.

IV Iowa District Court for Polk County -Judge Sherman Phipps - RULING ON DEFENDANT'S MOTION TO DISMISS

IN THE IOWA DISTRICT COURT FOR POLK COUNTY
Case No. CL91651
Filed March 10, 2003

Defendants' Motion to Dismiss comes on for hearing this date. The Court having reviewed the file, pleadings, and briefs herein and having heard the arguments of counsel for the parties finds as follows:

1. The Court has jurisdiction of the parties and the subject matter herein.

2. The Plaintiff, as a unsuccessful bidder in the bidding process used by the Iowa Senate and Iowa House of Representatives to procure printing services, does not have standing to bring this action. *Garling Construction, Inc. V. City of Shellsburg,* 641 N.W. 2nd 522, 523-524 (Iowa 2002)

3. Plaintiff in its application for writ of mandamus is asking the Court to establish rights rather than to enforce a right of the Plaintiff. Plaintiff also acknowledges the existence of Defendants' discretion as it relates to the bidding process (see Exhibit D., paragraph 4 attached to Plaintiff's petition). Mandamus is therefore not an appropriate remedy. *Hewit v Ryan*, 356 N.W. 2nd 230,233 (Iowa 1984)

WHEREFORE Defendants' Motion to Dismiss is GRANTED.

DATED THIS 7TH day of March, 2003.
/s/ SHERMAN W. PHIPPS, JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

V. Iowa District Court for Polk County -Judge Sherman Phipps - Order and Opinion Granting State's Motion to Dismiss - Expanded

IN THE IOWA DISTRICT COURT FOR POLK COUNTY
Case No. CL91651
Filed March 10, 2003
RULING

Plaintiff's Motion to Reconsider Ruling on Defendant's Motion to Dismiss and Enlarge Findings and Conclusions came before the Court on May 8, 2003. The Court having reviewed the file, pleadings, and briefs herein and having heard the arguments of counsel for the parties finds as follows:

1. The Court has jurisdiction of the parties and the subject matter herein.

2. It is appropriate for the Court to enlarge on its findings and conclusions as set forth in its ruling on Defendant's Motion to Dismiss (hereinafter "the Ruling" entered herein on March 10, 2003.

3. In paragraph 2 of the Ruling, the Court stated "The Plaintiff, as a unsuccessful bidder in the bidding process used by the Iowa Senate and Iowa House of Representatives to procure printing services, does not have standing to bring this action. *Garling Construction, Inc. V. City of Shellsburg,* 641 N.W. 2nd 522, 523-524 (Iowa 2002)"

4. As pointed out in Brief in Support of Plaintiff's Resistance to Defendant's Motion to Dismiss, the Iowa Court in *Garling* at page 524 did go on to say "Denial of standing to an unsuccessful bidder does not mean violation of a bidding statute will necessarily go unchallenged. An injunction action, mandamus or declaratory judgement might still be available."

5. The remedies requested by Plaintiff (page 6, Plaintiff's Petition) included a request for a temporary injunction and, further, a request for a writ of mandamus for the reasons set forth in the final two paragraphs of Plaintiff's

Petition.

6. Plaintiff's request for injunctive relief was withdrawn in the case in writing on January 16, 2003 (Motion to Withdraw Request for Temporary Injunction).

7. The only remaining remedy requested by Plaintiff in its Petition was issuance of a writ of Mandamus, "mandating that they [the Defendants] withdraw the award of the printing contract..."

8. This Court addressed the Plaintiff's request for a writ of mandamus in paragraph 3 of the Ruling. That paragraph is expanded by adding thereto the following: "Principles governing mandamus are well established. It is a drastic remedy to be applied only in exceptional circumstances. It is not to be used to establish rights but to enforce rights that have already been established." *Stith v Civil Service Commission of Des Moines*, 159 N.W.2nd 806,808 (Iowa 1968). "The writ can be used to compel a tribunal to act but cannot control its discretion." *Hewitt. Ryan*, 356 N.W.2nd 230, 233 (Iowa 1984)0. The Plaintiff now argues that this Court has no basis for its conclusion that "Plaintiff...is asking the Court to establish rights rather than enforce a right of the Plaintiff," Plaintiff takes the position that such a conclusion cannot be reached without "..litigation and a fair hearing on the issue" (page 2 of Plaintiff's Motion to Reconsider Ruling on Defendants' Motion to Dismiss and Enlarge Findings and Conclusions).

9. Plaintiff's pleadings fail to recite the violation of any specific rights of the plaintiff. The Plaintiff does not claim that Defendants have failed to comply with any statutory requirements or even any specific written procurement rules. Plaintiff acknowledges (Page1, Brief in Support of Plaintiff's Resistence to Defendant's Motion to Dismiss) that it "...does not challenge the bidding process per se...".

10.Plaintiff's own pleadings establish that the Plaintiff's intent in bringing this suit is in fact to challenge th-

Defendant's exercise of Discretionary powers (see line 1, page 6 of Brief in Support of Plaintiff's Resistence to Defendant's Motion to Dismiss; paragraph 21, page 6 of Petition, opening paragraph in Plaintiff's Petition.

11. Plaintiff's own pleadings make it clear that the request for mandamus in this case is a request that the Court (a) compel the Defendant's to establish rights on its behalf and (b) interfere with the Defendant's discretionary powers rather than a request to enforce any rights already established for the Plaintiff.

12. Writ of mandamus, the only relief still requested in Plaintiff's pleading at the time of the Court's ruling on March 10, 2003, is not a remedy available to the Plaintiff in this case.

WHEREFORE, for the reasons set forth in the Court's ruling of march 10, 2003, and for the reasons set forth herein, Defendants' Motion to Dismiss is GRANTED. Costs hereof are assessed to the Plaintiff.

DATED this 15th day of May, 2003.

/s/ SHERMAN W. PHIPPS, JUDGE
Fifth Judicial District of Iowa

VI. Court of Appeals of Iowa - Order and Opinion Affirming District Court Order *NOTE: It is this Ruling that is sought to be reviewed.*

IN THE COURT OF APPEALS OF IOWA
No. 4-118 / 03-1006
Filed April 14, 2004
MACDONALD LETTER SERVICE, INC.
Plaintiff-Appellant,
vs.
MICHAEL MARSHALL, SECRETARY OF THE IOWA SENATE, and MARGARET THOMPSON, CHIEF CLERK OF THE IOWA HOUSE OF REPRESENTATIVES,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk COUNTY, Sherman W. Phipps, Judge.

MacDonald Letter Service, Inc. Appeals from the district court's grant of defendant's motion to dismiss. AFFIRMED.

Terrance Swanson and Dallas Janssen, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Grant Dugdale, Assistant Attorney General.

Considered by Zimmer, P.J. and Miller and Hecht, JJ.

HECHT, J.

MacDonald Letter Service, Inc. (MacDonald) appeals from the district court's grant of the defendant's motion to dismiss. We affirm.

Background Facts and Proceedings.

In December 2002, MacDonald submitted a bid for the 2003-2006 Iowa legislative printing contract. Although MacDonald's was the lowest of the four bids submitted,

Michael Marshall, Secretary of the Iowa Senate and Margaret Thompson, Chief Clerk of the Iowa House of Representatives, awarded the contract to Garner Printing.

On January 10, 2003, MacDonald file suit requesting "equitable relief from the arbitrary and capricious and excessively expensive exercise of the administrative discretion by [Marshall and Thompson] in the awarding of a contract for printing services." Specifically, MacDonald requested an injunction preventing Marshall and Thompson form entering into the contract with Garner Printing. Additionally, MacDonald requested a writ of Mandamus requiring the defendant''s to award the contract to MacDonald. MacDonald subsequently withdrew its request for a temporary injunction and Marshall and Thompson filed a motion to dismiss. The district court granted the motion, concluding MacDonald, as an unsuccessful bidder on a government contract did not have standing to challenge the bidding process. The district court further concluded that a writ of mandamus was not an appropriate remedy in MacDonald's action.

MacDonald filed a motion to reconsider and enlarge. After a hearing, the district court enlarged its findings, but again dismissed MacDonald's action. MacDonald appeals, alleging (1) an unsuccessful bidder on a government contract does have standing in Equity to challenge the bidding process; (2) a writ of mandamus is an appropriate remedy under the circumstances of this case; and (3) dismissal of its claim violates its rights under the Iowa and the United States constitutions.

Standard of Review and Error Preservation.

Although we normally review actions in equity de novo, Iowa R. App. P. 6.4, we review decisions on motions to dismiss for errors at law. *Barkema v. Williams Pipeline Co.* 666 N.W. 2nd 612, 614 (Iowa 2003). Because MacDonald failed to argue to the district court that the dismissal of its claim violates its rights under the Iowa and the United States constitutions, we

will not address this argument for the first time on appeal. *Kroblin v RDR Motels, Inc.* 347 N.W. 2nd 430, 434 (Iowa 1984).

While conceding it does not have standing at law, MacDonald contends Iowa law permits an unsuccessful bidder to challenge the bidding process in equity.

However, our supreme court has concluded an unsuccessful bidder lacks standing to bring an action in equity. *Elview Constr. Co. V. North Scott Comm. Sch. Dist.*, 373 N.W. 2nd 138, 141 (Iowa 1985) "The reasoning for Elview's standing decision is that the truly damaged party is the taxpayer, not the one who has lost a bid through some claimed error." *Garling Construction, Inc. V. City of Shellsburg,* 641 N.W. 2nd 522, 523-524 (Iowa 2002).

MacDonald relies on language in Garling noting that while an unsuccessful bidder does not have a cause of action at law, " [a]n injunction, mandamus, or declaratory judgement might still be available." Id. At 524. MacDonald urges us to conclude that this language in *Garling* indicates our supreme court intended to make available actions in equity for unsuccessful bidders. However, we conclude our supreme court, in *Garling*, reaffirmed the holding in Elview precluding suits in equity by unsuccessful bidders, despite the dicta regarding the possible availability of injunctions, writs of mandamus, or declaratory judgements. Accordingly, we affirm the district court's dismissal of MacDonald's cause of action.

Writ of Mandamus.

A writ of mandamus is a drastic remedy which is not used to establish rights but rather to enforce rights that already exist. *Hewitt v. Ryan*, 356 N.W. 2nd 230, 233 (Iowa 1984); *Stith v Civil Service Commission of Des Moines*, 159 N.W.2nd 806,808 (Iowa 1968). We agree with the district court's conclusion that MacDonald is both asking the court to establish rights rather than enforce rights that already exist and control the exercise of discretion of an inferior tribunal. Accordingly,

we conclude a writ of mandamus is unavailable under these circumstances and affirm.
AFFIRMED.

VII. Supreme Court of Iowa - Order

IN THE SUPREME COURT OF IOWA
No. 03-1006
Polk County No. CL91651
MACDONALD LETTER SERVICE, INC.
Plaintiff-Appellant,
vs.
MICHAEL MARSHALL, SECRETARY OF THE IOWA SENATE, and MARGARET THOMPSON, CHIEF CLERK OF THE IOWA HOUSE OF REPRESENTATIVES,
Defendants-Appellees.

After consideration by this court en banc, further review of the above captioned case is denied.

Dated this 30th Day of July, 2004.

THE SUPREME COURT OF IOWA

/s/ Louis A. Lavorato, Chief Justice

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